United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

UNITED STATES OF AMERICA,
Defendant-in-Error.

vs.

BERNARD WARD and T. FURIHATA,
Plaintiffs-in-Error.

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF T. FURIHATA,
Plaintiff-in-Error.

WALTER METZENBAUM,
Attorney for Plaintiff-in-Error,
Seattle, Washington.

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STATEMENT OF THE CASE.

An information was filed in the lower court charging the plaintiff-in-error, T. Furihata, and two others, Emil Hoffman and Bernard Ward, with several violations of the National Prohibition Act. The information contained three counts. In count one the defendants were charged with the unlawful possession of intoxicating liquor. In count two they were charged with the unlawful sale of intoxicating liquor. In count three they were charged with maintaining a common nuisance. (Trans. p. 2.)

When arrainged each of the defendants pleaded "Not Guilty" to each of the counts in the information. (Trans. p 6.)

At the trial evidence was introduced which tended to show that the plaintiff-in-error was the lessee of the New Avon Hotel in the City of Seattle, a large hotel situated in the center of the city and containing over a hundred rooms. That the defendant, Emil Hoffman, was employed by the plaintiff-in-error as a clerk in the hotel.

On the 17th day of August, 1922, about the hour of 3:00 o'clock in the afternoon a prohibition agent named O'Hara went to the hotel office on the street floor and solicited the purchase of a drink of whiskey from the defendant, Hoffman. That thereupon Hoffman by way of the elevator took him to the sixth floor of the hotel to room No. 606, a room which was exclusively occupied by the defendant, Hoffman, as his residence, and there sold him a drink of whiskey. That thereafter on the same day about 4:30 o'clock in the afternoon, the agent again visited the hotel and succeeded in buying two bottles of whiskey from the defendant, Hoffman. That plaintiff-in-error was not present or in the hotel at the times when the drink of liquor and the two bottles of liquor were sold to the Government agents.

In addition to the liquor purchased, the Government agents, acting under a search warrant for

the premises found some liquor concealed in several other guest rooms.

No proof was offered of any sales of liquor other than the two mentioned herein and no attempt was made to prove that the hotel had a previous bad reputation.

At the close of the Government's case in-chief, a motion for a directed verdict of acquittal was interposed on behalf of the plaintiff-in-error, based on the ground that the evidence failed to connect him with the possession of intoxicating liquor, or with the two sales thereof, or with the maintenance of a common nuisance, which motion after argument was denied and exception allowed. The Trial Judge, however, suggested that it could be interposed again at the close of the entire case. (Trans. p. 18.)

Upon behalf of the plaintiff-in-error it was shown that the defendant, Hoffman, had been employed by the plaintiff-in-error as the hotel clerk for a short time prior to the visit of the Government agents, that the first sale was made in his own room from a bottle of liquor belonging to him personally and that the second sale was made from a supply belonging to another guest in the hotel, who was a friend of the clerk; that the plaintiff-in-error

did not authorize, assent to or know of the sale or of the presence of the liquor on the premises. That the clerk was acting surreptitiously in his own interest and for his own profit and without the knowledge or connivance of the proprietor of the hotel, plaintiff-in-error.

No rebuttal testimony was offered by the Government, and thereupon, the motion for a directed verdict of acquittal as to each count in the information was again interposed because of the insufficiency of the evidence. This motion after argument was denied and an exception allowed. (Trans. p. 24.)

In the course of his instructions the Trial Judge instructed the jury as follows:

> "You are instructed that a person makes a sale when upon request he delivers the commodity, which purchase is sought for a compensation and the person may make the sale whether he does it personally or does it through another. In this case the testimony is uncontradicted that the defendant, Furihata, was the proprietor of the hotel. The testimony likewise is that the defendant, Hoffman, was a clerk and employee of the hotel; he had a master key to all of the rooms in which liquor was found. He testified that he had access to the key that locked the rooms in which liquor was, and could have gotten the key if he had been permitted by the officers—have gone and gotten it for them; but they would not permit him to go out of their sight."
>
> "You are instructed that the proprietor,

Furihata, was in possession presumptively of the entire hotel, and he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession. There is testimony before you that the rooms in which the liquor was found were unoccupied, and you will remember the testimony with relation to the examination of the register and the statement of the defendant, Hoffman, the clerk, with reference to the occupancy of these rooms; and the condition of the rooms on the inside, as disclosed by the witnesses, as to the evidence of the occupancy, and if these rooms were unoccupied then they would in law be presumed to be in possession of the defendant, Furihata, the owner or proprietor, and he would be in constructive possession of everything in the room. If Furihata was in possession of the liquor in the rooms and the defendant, Hoffman, was in his employ, and he had access to the rooms, then the defendant Hoffman's possession of the rooms would be the possession of Furihata, and authorized and presumed to make such disposition as the testimony convinces you from all the facts and circumstances that the authority of his employment warranted. And if you believe from the testimony and the circumstances surrounding that the employment of Hoffman by Furihata, covered the authority to dispense or sell the liquor, and the defendant, Hoffman, made the sale, as he said he did, then the sale would otherwise be the sale of Furihata, no matter where he was, whether in the city, in Tacoma or Portland, or where he may have been."

To these instructions timely exceptions were taken and the following colloquy had between the

trial judge and the attorney for the plaintiff-in-error:

> Mr. Dore: "Note the following exception: The defendants note an exception to that instruction on which the court told the jury the owner of a hotel is presumptively in possession of the entire hotel, and the law presumes him to be in the exclusive possession of everything found in the hotel. The instruction is erroneous."

And thereupon the court again instructed the jury upon the question of constructive possession as follows:

> The Court: "If I used the word 'Presumption,' I will say, where I used the word 'presumption,' while it may not make any difference, if a person is in constructive possession of everything in a room of which he has exclusive possession."

And to which additional instruction defendant took an exception before the jury retired, as follows:

> Mr. Dore: We note that exception, that does not apply to hotel proprietors; abstractedly, it is correct, but not applicable to this case; there is no testimony here that anybody had exclusive possession of anything.
>
> The Court: Well, the proprietor is in possession of a room unless someone else is in possession of it.
>
> Mr. Dore: We wish an exception to that instruction, that a proprietor is in possession of everything in a room that is not occupied by a guest, because he is not in possession of

an unoccupied room, unless he has knowledge of what is in it.

The Court: The only issue here is liquor. I will say that the testimony shows that the defendant, Furihata, is the lessee and the proprietor of this hotel, and as such he is in constructive possession of what is in the room, and would be in constructive possession of everything in the room.

Mr. Dore: I want to note an exception to that instruction—note an exception that one who is an employee of a hotel can be found guilty of maintaining a nuisance, on the ground that the word "maintenance" in itself carries an implication that it does not concern an employee; one must have some control beyond mere employment. (Trans. pp. 24-34.)

Thereupon the jury retired and after deliberation returned a verdict finding the plaintiff-in-error guilty of each count in the information. (Trans. p. 8.)

Motion for a new trial was duly interposed on the following grounds:

1. That the verdict was contrary to the law and to the evidence.

2. That there was no evidence to sustain the verdict.

3. Error of law occurring at the trial and duly and regularly excepted to.

This motion, after argument, was denied and an exception allowed. (Trans. pp. 9-10.)

Thereafter the Court sentenced the plaintiff-in-error to six months imprisonment and a fine of $1,000 on Count II and a fine of $300 on Count I. (Trans. p. 12.)

ASSIGNMENT OF ERRORS.

Comes now the defendant, T. FURIHATA, and in connection with his petition for a writ of error in this cause, assigns the following errors which said defendant avers occurred at the trial thereof, and upon which he relies to reverse the judgment entered herein, as appears of record.

I.

That the court erred in denying the motion of defendant, T. Furihata, for a directed verdict as to Counts I, II and III of the information, after the direct evidence, and renewed at the conclusion of the Government's case.

II.

The court erred in denying the defendant, T. Furihata, his motion for a new trial herein, which motion was made in due time after the jury returned a verdict of guilty on the following grounds:

1. The verdict is contrary to the law and the evidence.

2. There is no evidence to sustain the verdict.

3. Error of law occurring at the trial and duly and regularly excepted to.

IV.

The court erred in imposing sentence on the said T. Furihata of six months imprisonment and $1,000 fine on Count II and a fine of $300 on Count I.

V.

That the court erred in instructing the jury that a person makes a sale when he delivers a commodity, whether he does it personally or through another, said instruction being as follows:

> "You are instructed that a person makes a sale when upon request he delivers the commodity, which purchase is sought for a compensation and the person may make the sale whether he does it personally or does it through another. In this case the testimony is uncontradicted that the defendant, Furihata, was the proprietor of the hotel. The testimony likewise is that the defendant, Hoffman, was a clerk and employee of the hotel; he had a master key to all of the rooms in which liquor was found. He testified that he had access to the key that locked the rooms in which liquor was, and could have gotten the key if he had been permitted by the officers—have gone and gotten it for them, but they would not permit him to go out of their sight."

The defendant excepted to this instruction before the jury retired to consider its verdict.

VI.

The court erred in instructing the jury that the defendant T. Furihata was in possession presumptively of the entire hotel and that he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession, and that the possession of the defendant, Hoffman, of any room would be the possession of the same room by the defendant, Furihata, if the employment of Hoffman by Furihata covered the authority to sell liquor, which instruction was as follows:

> "You are instructed that the proprietor, Furihata, was in possession presumptively of the entire hotel, and he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession. There is testimony before you that the rooms in which the liquor was found were unoccupied, and you will remember the testimony with relation to the examination of the register and the statement of the defendant Hoffman, the clerk, with reference to the occupancy of these rooms; and the condition of the rooms on the inside, as disclosed by the witnesses, as to the evidence of the occupancy, and if these rooms were unoccupied then they would in law be presumed to be in possession of the defendant, Furihata, the owner or proprietor, and he would be in constructive possession of everything in the room. If Furihata was in possession of the liquor in the rooms and the defendant, Hoffman, was in his employ, and he had access to the rooms, then the defendant Hoffman's possession of the rooms would be the

> possession of Furihata, and authorized and presumed to make such disposition as the testimony convinces you from all the facts and circumstances that the authority of his employment warranted. And if you believe from the testimony and the circumstances surrounding that the employment of Hoffman by Furihata covered the authority to dispense or sell the liquor, and the defendant Hoffman made the sale, as he said he did, then the sale would otherwise be the sale of Furihata, no matter where he was, whether in the city, in Tacoma or Portland, or where he may have been."

and to this instruction defendant excepted before the jury retired to consider its verdict, as follows:

> Mr. Dore: Note the following exception: The defendants note an exception to that instruction on which the court told the jury the owner of a hotel is presumptively in possession of the entire hotel, and the law presumes him to be in the exclusive possession of everything found in the hotel. The instruction is erroneous.

And thereupon the court again instructed the jury upon the question of constructive evidence as follows:

> The Court: If I used the word "presumption" I will say, where I used the word "presumption," while it may not make any difference, if a person is in constructive possession of everything in a room of which he has exclusive possession.

And to which additional instruction defendant took an exception before the jury retired, as follows:

> Mr. Dore: We note that exception, that

does not apply to hotel proprietors; abstractedly, it is correct, but not applicable to this case; there is no testimony here that anybody had exclusive possession of anything.

The Court: Well, the proprietor is in possession of a room unless someone else is in possession of it.

Mr. Dore: We wish an exception to that instruction, that a proprietor is in possession of everything in a room that is not occupied by a guest, because he is not in possession of an unoccupied room, unless he has knowledge of what is in it.

The Court: The only issue here is liquor. I will say that the testimony shows that the defendant Furihata is the lessee and the proprietor of this hotel, and as such he is in constructive possession of what is in the room, and would be in constructive possession of everything in the room.

Mr. Dore: I want to note an exception to that instruction—note an exception that one who is an employee of a hotel can be found guilty of maintaining a nuisance, on the ground that the word "maintenance" in itself carries an implication that it does not concern an employee; one must have some control beyond mere employment.

ARGUMENT.

The motion for a directed verdict of acquittal interposed by the plaintiff-in-error at the close of the Government's case-in-chief directed to each of

the three counts in the Information should have been granted.

At that time it appeared from the evidence that the liquor found in several guest rooms of the hotel was carefully secreted, so that it could not be readily seen or discovered, and that the two sales to the Government agents were made by the clerk in charge of the hotel in the absence of the plaintiff-in-error and under circumstances which established beyond any question that these sales were made without the knowledge, assent or connivance of the plaintiff-in-error.

Plaintiff-in-error is a Japanese and the conduct and management of the hotel was left to his employees, the day and night clerks. The business of the plaintiff-in-error was a legitimate and lawful one and he could not be held criminally responsible for any unlawful act or acts done by his employees without his knowledge, assent or connivance for the reason that such unlawful acts were entirely without the scope of their employment. The general rule is well stated in

> *Hiff vs. State,* 5 Blackf. 149 (33 Am. Decisions 463);

and in

Woolen & Thornton on Intoxicating Liquors, Sec. 805,

as follows:

> "The general rule is that a master is liable in a civil suit for the negligence or unskillful acts of his servant when he is acting in the employment of his master; but that he is not subject to be punished by indictment for the offenses of his servant unless they were committed by his command or with his assent,"

and also in *Lauer vs. State,* 24 Ind. 131, and *Woolen & Thornton on Intoxicating Liquors,* Sec. 805, as follows:

> "We must not hold men responsible for crimes committed by others without some proof that they either procured, consented or advised in their perpetration. We know full well that in this class of cases the guilty may sometimes escape for the failure of this proof and that it may sometimes be impossible to produce it in cases where it exists, but these considerations are also applicable to every other class of crimes."

It is generally held by the authorities that the owner or proprietor of a hotel is not regarded as being in possession of, and is not responsible criminally for intoxicating liquor found in the guest rooms of the hotel unless he had knowledge of its presence there.

Harris vs. State, 111 SE. Rep. 886, (Ga.);

Tunner vs. State, 185 Pac. 1104, (Okla);

Everman vs. Commonwealth, 248 S. W. Rep. 485 (Ky.).

It has also been held repeatedly by courts of last resort that sales of intoxicating liquor by employees of a hotel company, or a hotel proprietor, such as clerks, waiters and bell-boys, are not chargeable to the company or the proprietor in the absence of evidence showing participation or connivance and that knowledge on the part of the one accused of aiding or abetting a violation of the law prohibiting the possession or sale of intoxicating liquor is an indispensable element of a provable case.

Everman vs. Commonwealth, 248 SW. Rep. 485, (Ky.);

Barber vs. Kirkwood Hotel Co., 151 NW. Rep. 446, (Iowa);

State vs. Crawford, 132 SW. Rep. 43, (Mo.);

State vs. Ford, 219 SW. Rep. 702, (Mo.);

Commonwealth vs. Riley, 81 NE. Rep. 881, (Mass.);

Commonwealth vs. Riley, 10 L. R. A. (N. C.), 1122.

In discussing this question, it was said in the case of *Everman vs. Commonwealth, supra,* that

> "Appellant was engaged in the hotel business. Her house was a place of public entertainment, and, while we do not hold in such circumstances that it was necessary for the Common-

> wealth to prove the appellant actually saw the liquor and aided in concealing or keeping it, we do think that it was necessary to show facts and circumstances from which it could be reasonably inferred that she knowingly aided or assisted in unlawfully acquiring, retaining or concealing it."

In the present case the evidence introduced on behalf of the Government established affirmatively that the plaintiff-in-error was not present when the two sales were made and that they were made by the clerk of the hotel in a secretive and surreptitious manner, and that the liquor found in the several guest rooms was secreted in such a way that it could not be discovered except as a result of a diligent, thorough and painstaking search. So much for that part of the motion as was directed to the first and second counts of the information.

The third count charged the plaintiff-in-error with the maintenance of a common nuisance. In the first place the evidence adduced in support of the Government's case in chief failed to establish that the hotel in question was being maintained or conducted as a common nuisance. Something more must be shown than a single sale or two separate sales of intoxicating liquor on the same afternoon to prove that a hotel is being conducted in such a way as to be a common nuisance to the general public.

Murphy vs. United States, 289 Fed. Rep. 780;
Baker vs. United States, 289 Fed. Rep. 249.

If, in fact, a hotel or other place is being conducted as a common nuisance, that fact is easily susceptible of proof. It may be shown by proof of habitual sales of intoxicating liquor; it may be shown by the class, character and condition as to sobriety of the persons who frequent it; it may be shown by proof of its general public reputation, and it may be shown by boisterous and disorderly conduct of the persons who frequent it. No attempt was made to prove such facts or any of them in the present case. Nothing, whatever, was shown except two sales during the same afternoon and the finding of some liquor secreted in several guest rooms of the hotel. This was clearly insufficient to establish that the hotel in question was a common nuisance.

In the second place, all that has been said in reference to Count I and II of the Information is applicable to the nuisance count. If the plaintiff-in-error was absent when the sales were made and did not know of or assent to these sales being made and did not know of the presence of the secreted liquor in the several guest rooms, he could not be held criminally responsible for maintaining a common nuisance.

In the course of his instructions the Trial Judge instructed the jury that a hotel proprietor, whether the hotel be one of ten rooms or of two hundred, is constructively in possession of everything found in the hotel and if intoxicating liquor is sold upon the premises by any one of his employes, whether that employee be a clerk, waiter, bell-boy or janitor, he is presumed to have authorized it and is criminally liable therefor. These instructions were erroneous and misled the jury to the prejudice of the plaintiff-in-error. The instruction as to the constructive possession leaves out the most essential element, that of knowledge. To hold a hotel proprietor criminally responsible for the possession of intoxicating liquor found in the guest rooms of the hotel, it must be shown that he actually knew of its presence or knew of the facts and circumstances sufficient of themselves to charge him with knowledge. The evidence as a whole shows that he did not know that there was any liquor in the hotel and the circumstances, such as the manner in which it was concealed and the places where it was concealed negative the idea that the facts and circumstances charged him with notice.

The instruction on the subject of presumption is equally erroneous. The hotel business is a lawful and legitimate business and the proprietor of a hotel is

not chargeable criminally with the criminal acts of his employees committed without the scope of their employment and in the commission of which he did not participate, connive, assist or assent to. But even conceding that such a preposterous rule exists it could have no application to the present case for the reason that it was proven by the uncontradicted testimony of the clerk that the two sales in question were made by him secretively in the absence of the plaintiff-in-error and without his knowledge or consent, and that the liquor found in the guest rooms was secreted by him for his own use and without the knowledge or consent of the plaintiff-in-error.

No rule is more firmly imbedded and established in the law than that presumptions of law exist only in the absence of actual evidence and that when actual or positive evidence is introduced upon a given or material fact in issue all presumptions of law *ipso facto* cease to exist. It is for this reason we contend that the motion for a directed verdict of acquittal at the close of the enire case should have been granted, and the failure of the Trial Judge to grant this motion is a reversible error.

We respectfully submit that this cause should be reversed and remanded to the lower court with

directions to dismiss the same and discharge the plaintiff-in-error from custody.

WALTER METZENBAUM,

Attorney for Plaintiff-in-Error,
T. Furihata.